No. 3953

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FORBES P. HASKEL, Jr., as Receiver of SCANDINAVIAN-AMERICAN BUILDING COMPANY, a Corporation, et al.,

Appellant,

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al.,

Appellees.

Petition for Re Hearing of McClintic-Marshall Company

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Filed this ..... *of May, 1923.*
FRANK D. MONCKTON, Clerk.
By ..... *Deputy Clerk.*

Ray Printing Co.—Tacoma

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The McClintic-Marshall Company, one of the appellants in the joint appeal prosecuted by E. E. Davis & Co., Far West Clay Company, and itself, and an appellee in respect to each of the other appeals involved in this proceeding, respectfully petitions this court for a rehearing of this cause upon two of the questions involved, namely: the rank of the lien to be awarded to the Tacoma Millwork Supply Company; second, the right of Tacoma Millwork Supply Company and Washington Brick Lime & Sewer Pipe Company to any lien at all.

I.

Rank of Lien of Tacoma Millwork Supply Co.

We, and all parties interested in this cause, sincerely appreciate the expedition with which the opinion was rendered, but, nevertheless, feel that this point was overlooked. It was squarely raised as a ground for reversal by Assignment of Error No. III on the appeal taken jointly by E. E. Davis & Co., Far West Clay Company and McClintic-Marshall Company. It was argued both in the brief filed by those appellants (see pp. 16 and 30 to 31 of their brief) and in the brief filed by McClintic-Marshall Company in connection with the appeal of the Tacoma Millwork Supply Company. (See pp. 58 and 59 of its brief). It was orally argued by the writer hereof. It is not referred to in the opinion filed, notwithstanding this statement:

> "Some of the grounds urged for reversal are "common to more than one of the parties, but "all are believed to be included in the following "statement."

The all embracing language used by the writer of the opinion and the comprehensiveness of his statement of the several grounds urged for reversal, as well as the summary disposition of such claims as were found to be without merit, impel the conclusion that the present point was lost in the general mass rather than disregarded as unworthy of notice. With that conviction we present that branch of this petition.

In a contest for priority such as this the rank to be assigned any claim comes next in importance to the establishment of the claim itself. Yet the opinion rendered, while awarding the Tacoma Millwork Supply Company a lien, leaves the determination of the rank of such lien to inference. We therefore pray a rehearing or a supplemental opinion to fix definitely that rank. The case should not be remanded with any ambiguity inhering in it if such ambiguity can be resolved here.

Under the Washington Mechanics' Lien Law a contractor's or sub-contractor's lien is inferior to to those of laborers, and materialmen.

> "In every case in which different liens are "claimed against the same property the court "in the judgment must declare the rank of such "lien or class of liens which shall be in the fol- "owing order:— 1. All persons performing "labor; 2. All persons furnishing material; "3. The sub-contractor; 4. The original con- "tractor. And the proceeds of the sale of the "property must be applied to each lien or class "of lien in the order of its rank; * * *". (Remington's 1915 Code, Sec. 1141).

A contractor or sub-contractor undertaking to furnish the material and perform the labor requisite for the accomplishment of a certain portion of the building program cannot have separate liens, first, for the labor performed, and second, for the ma-

terials furnished. He has a lien according to his contract and its rank is thereby determined. This follows from the Washington statute and the contruction placed thereon by the Supreme Court of the State.

> "The contractor shall be entitled to recover "upon the claim filed by him only such amount "as may be due him according to the terms of "his contract after deducting all claims of "other parties for labor performed and materi- "als furnished; * * *". (Remington's Code, Sec. 1139.)

The entire lien law of this state was construed by the Supreme Court of the state with reference particularly to the nature and rank of contractors' and sub-contractors' liens in *Chavelle vs. Island Gun Club*, 77 Wash. 304, 137 Pac. 5. We crave the particular attention of this court to Judge Ellis's opinion in that case. That opinion is too long to be quoted in its entirety but after setting out Section 1129 of the Code, which is the initial section awarding a lien to laborers and materialmen, and the portions of sections 1139 and 1141 above quoted, proceeds as follows:

> "A reading of these sections, and an applica- "tion of the liberal rule of construction pre- "scribed by the section last quoted, induces the "view that it was the intention of the law "makers to provide a lien for every person

"furnishing materials going directly into the "given structure or performing labor directly "upon it. The provision first quoted (Sec. 1129) "accords a lien to every person performing labor "or furnishing materials, and Section 1141 clas- "sifies all persons doing either, and prescribes "the rank of their liens. Section 1139, taken "in connection with Section 1141, must be con- "strued as using the word 'contractor' in its "generic sense, and including both the principal "contractor and subcontractors, else there "would be no lien for a subcontractor as such "and no lien whatever for a subcontractor ex- "cept as he might also be a laborer or a materi- "alman. *The latter cannot be the intention, "because, in Section 1141, the subcontractor's "lien is subordinated to that of laborers and "materialmen,* which would be wholly sense- "less unless there were *a distinction between "the lien of a subcontractor and that of a "laborer or materialman.*

"Construing these three sections together "and giving a meaning to each, it is clear that "a subcontractor as such is entitled to a lien "for labor or materials or both, furnished and "paid for by him in the performance of some "specific part of the work under contract with "the principal contractor, as distinguished from " the lien prescribed for laborers and material- "men as such . The recovery on a subcontract- "or's lien is, therefore, like that of any other

"contractor given under Section 1139 'accord-
"ing to his contract;' otherwise it has no in-
"dependent existence, though expressly sub-
"ordinated to, and hence distinguished from,
"the liens of laborers and materialmen under
"Section 1141. It follows that the only sensible
"distinction between the lien accorded to the
"principal contractor and the subcontractor is
"found in the fact that, in marshaling liens,
"the latter ranks the former and receives a
"preference in the distribution of the pro-
"ceeds of the sale of property subject to the
"liens on foreclosure, just as the latter is sub-
"ordinated to the liens of laborers and materi-
"almen as such.

"There is, and can be, no distinction as to
"the character of the items going to make up
"the lien claim of the principal contractor
"and that of a subcontractor without destroy-
"ing the lien of the latter as a distinct lien.
"Each is entitled to recover upon his lien claim
"the amount due according to his contract,
" 'after deducting all claims of other parties
for labor performed or materials furnished.' *
"* * " (Op. 77 Wash. pp. 307-308.)

If, then the Tacoma Millwork Supply Company was, with respect to all or any part of the work undertaken by it for the Scandinavian-American Building Company, in the position of a contractor or subcontractor, as distinguished from a material-

man, the lien to be awarded it, if any, must, as to the portion as to which it is deemed to be a contractor, be ranked in the judgment as inferior to the liens of laborers and materialmen.

It is and has been our contention, though unnoticed or disregarded, that this claimant was, as to all of its work, in the position of a contractor and that any lien which it might be awarded was, therefore, subordinate to the lien of McClintic-Marshall Company as a materialman and to all other liens of materialmen and laborers. The facts are that the Tacoma Millwork Supply Company undertook as one transaction to furnish and install the interior millwork for this building. It is true that certain divisions of this work were embodied in separately executed documents, but that they in point of fact constituted one transaction and one contract seems an inevitable conclusion from the following undisputed facts. The several documents were executed simultaneously as one transaction. (See Exhibits 151-, 152 and 153; Tr. pp. 746, 758 and 763, and paragraph XII of the original answer and cross complaint and as repeated in the amended answer; Tr. pp. 171 and 218.) The claimants themselves so allege the transaction.

> "That the contract, Exhibit "C", being a "contract for the erection of the two several "characters of millwork hereinbefore referred "to as being manufactured under Exhibits 'A' "and 'B' attached hereto and made part here-

"of, was entered into contemporaneously with "the said other or remaining contracts by "these, your cross complainants, and formed "and is a part of the consideration entering "into the two remaining contracts, and was "all one and the same transaction, each con- "tract being a consideration for the entry "into the other."

(See paragraph XVI of Tacoma Millwork Supply Company's answer and cross complaint; Tr. pp. 173 and 221). They so describe it in their testimony (See Tr. p. 701). The language of the contracts themselves shows their corelation. Thus, in Exhibit 151, which is referred to as the material contract, it is provided "all the work aforementioned to be delivered and *put in place.*" (See Tr. p. 749, italics ours). The italicized requirement of the contract obviously would be improper and out of place in a contract which contemplated only the furnishing of the material. And again in the banking quarters contract, Exhibit 152, there is this provision as to payment:

"And the balance of 25% to be paid within "30 to 60 days from the completion and ac- "ceptance of the mill work and erection covered "by this contract." (See Tr. p. 764).

So the execution of the work embraced in these separate documents was commingled. Part of the labor called for by the so-called erection contract

was done, not at the building but in conjunction with the finishing of the material in preparation for and prior to any delivery or tender of delivery of it under the so-called material contract. (See Tr. pp. 674 and 688). The lien claim upon which the Tacoma Millwork Supply Company relies combines all work and treats the matter as one transaction. (See Exhibit 174; Tr. 785 to 787). In fine, the lien claimants, both during the execution of the work which they had contracted to do and in seeking relief thereon, have construed these several documents as constituting a single transaction and one general contract for the furnishing and erection of the interior mill work.

Furthermore, these claimants admit that as to the so-called banking quarters contract are contractors. (See Tacoma Millwork Supply Company brief, p 97). Part of the material, which has been completed and actually delivered, though not installed, is material called for by this division or branch of the general contract. It amounts to $1957. (See Exhibit C-1 to Exhibit 154; Tr. p. 770). In the face of the statute, Remington's 1915 Code, Sections 1139 and 1141, and of the construction placed thereon by the Washington Supreme Court, and against their own admissions, is this so-called bank quarters contract to be split or segregated and a materialman's lien, as distinguished from a contractor's lien, allowed them for the material called for by this contract which was com-

pletely manufactured and ready for delivery on January 15, 1921? There can be but one answer.

"Each lien shall stand upon its own footing"

Huttig Bros. Mfg. Co. vs. Denny Hotel Co., 6 Wash. 122 at p. 128.

If we have reached the correct conclusion—that the Tacoma Millwork Supply Company must be treated as having but one contract—then it follows inevitably that any lien which they may be awarded must be ranked as as contractor's lien. We therefore respectfully ask the court if it adheres to the position announced as to awarding that claimant a lien, to file a supplemental opinion adjudging, in accordance with the requirements of the statute, the rank of such lien and in so doing to adjudge that rank as that of a contractor, subordinate and inferior to the liens of laborers and materialmen.

II.

Right of Tacoma Millwork Supply Company and Washington Brick Lime & Sewer Pipe Company to any lien at all.

The opinion rendered on this point starts with the hypothesis that "the exact point here presented has never been determined by the Supreme Court of the State." Its argument proceeds:

"This case differs, therefore, in two im-
"portant respects from any of the cases de-

"cided in the Supreme Court. First, there "was here no intervention of contractor or "subcontractor and second, the material was "prepared especially for the building and is "of little or no value for any other purpose. "Under such circumstances, that is, where "the material man contracts directly with the "owner and where the material is manufac- "tured and especially designed for the building, "the material is furnished in contemplation of "law as soon as prepared and ready for de- "livery * * *."

We admit the difference in the first respect, though we deny that it is sufficient to justify a holding contrary to those of the Supreme Court of the State.

With respect to the second point of difference we respectfully submit that it is not well taken. *Huttig Bros. Manufacturing Company vs. Denny Hotel Company*, 6 Wash. 122, involved precisely such a claim as that of the Tacoma Millwork Supply Company and one similar in all respects to that of the Washington Brick Lime & Sewer Pipe Company. Of that claim it is said in the opinion:

"It is conceded that said materials were all "furnished under a contract between said res- "pondent and said contractor and that the same "were specially designed and made for said "building and are necessary to the completion "of the building;" (See 6 Wash. p. 124).

The decision in that case still stands as authority in the state of Washington without modification or impairment. It is therefore important to notice with some particularity the precise points covered by that decision. There the lien claimant, Huttig Bros. Manufacturing Company, having made a contract with the general contractor for the fabrication of the interior mill work according to special design, filed two claims of lien, the first being filed after these specially designed and manufactured materials had been completed and shipped, the second after such materials had arrived at Seattle and had been delivered to the hotel premises. It was held squarely that the first lien claim was prematurely filed for the reason that the materials had not been furnished so as to give rise to a claim of lien until they had been delivered to the premises. The fact that they were completely manufactured and ready for delivery and had been delivered to a common carrier was not enough.

We quote the pertinent portions of the opinion so holding:

> "It is contended that the materials have not "all been furnished when the claim of lien was "filed and that a party can have no lien for "materials which have not been furnished at "or prior to the filing of the lien notice. It "appears that two lien notices were filed, one "on March 7, 1891, which was ruled out by "the court at the trial on the ground that it

"was prematurely filed; but a subsequent notice "filed May 13, 1891, after the delivery of all "the materials, was admitted. The last portion "of the materials had been shipped and were on "their way here when the first notice was filed "but had not yet arrived. If, in consequence "of this, the first notice was prematurely filed, "it would not deprive the respondent of the "right to file another notice after all the ma- "terials had been delivered* * *

"Appellant contends that it commenced to "furnish materials from the time that it be- "gan to prepare the same for shipment in the "State of Iowa and in consequence of its hav- "ing commenced the preparation thereof be- "fore the execution of the mortgage its lien "is superior to the mortgage lien. But the "lien can hardly date from the time appellant "commenced the preparation of materials in "another state. It was to furnish the materials "delivered at the building in the city of Seattle "and its claim cannot be held to have attached before the delivery thereof. *Williams vs. Chapman*, 17 Ill. 423". (See Wash. op. at pp. 125 and 130.)

Therefore, unless the fact that in the Denny Hotel Case the materialman contracted with the general building contractor, while here the Tacoma Mill-work Supply Company and the Washington Brick Lime & Sewer Pipe Company contracted directly

with the owner, marks a real distinction in principle, this early holding of the Supreme Court of the State of Washington, which is the leading case in the state upon the subject, is directly contrary to the present holding of this court that material especially manufactured and designed for a building "is furnished, in contemplation of law, as soon as prepared and ready for delivery." In the same way that holding is contrary to the decisions in Congdon vs. Kendall, 73 N. W. 659, and McEwen vs. Montana Pulp & Paper Co. 90 Pac. 359, cited as supporting authority in the opinion filed.

The proposition thus resolves itself down to the narrow question, does the interposition of a general contractor between the owner and the materialman change the definition of or the construction to be placed upon the word "furnish" as used in the Washington Lien Statute?

The right of lien is purely statutory. The statute makes no distinction between a furnishing at the instance of the owner and one at the instance of the contractor. On the contrary it puts both instances on the same footing since it makes the contractor the agent of the owner. The material portions of the statute upon which the right to a lien must ultimately rest are as follows:

> "Every person * * * furnishing material to "be used in the construction, alteration or repair of any * * * building * * * or any other struc-

"ture * * * has a lien upon the same for the "* * * material furnished by each respectively, "whether performed or furnished at the in- "stance of the owner of the property subject "to the lien or his agent; and every contractor, "subcontractor, architect, builder or person "having charge of the construction, alteration "or repair of any property subject to the lien "as aforesaid, shall be held to be the agent of "the owner for the purposes of the establish- "ment of the lien created by this chapter: * * * * *" (Remington's 1915 Code, Sec. 1129)

In passing upon a claim of lien for materials under this statute the Supreme Court in *Fuller & Co. vs. Ryan*, 44 Wash 385, in an opinion in which Judge Rudkin concurred, said:

"If the materials were not used in the build- "ing, nor taken to the premises, we do not "think it could be said that they were pur- "chased to be used in such building, within "the meaning of the statute. The reason for "allowing a lien to secure the purchase price "of building material would seem to be absent "where such material was neither used in the "building nor taken to the premises for that "purpose; and it would be difficult to see why "the vendor of such material would have any "better right to a lien than would the seller "of any other species of personal property. "Doubtless, the actuating thought of the legis-

"lature was that the materialman should re-
"tain a purchase-price lien upon the thing it-
"self; and this could be accomplished only by
"allowing a lien upon the building and the pre-
"mises into which, or upon which said materi-
"al should become builded or delivered. To
"hold the right of lien further extended could
"only be done under a statute clearly evidenc-
"ing such an intention on the part of the legis-
"lature. We deem our statute incapable of such
"a construction."

Adapting the reasoning of that decision to the point under consideration, we assert that a definition or construction of the term "furnishing" as used in the statute differing according to who ordered the materials, can only be justified if the statute "clearly evidenced such intention on the part of the legislature". It is not suggested that the legislature has ever in any way evidenced or intimated any intention to make such a distinction.

The reasoning of the opinion filed is that the owner of the premises liened upon could accept delivery of material at a warehouse distant from the premises involved and that under such circumstances the validity of the lien claim could not be questioned. If so, a corporate owner could so accept delivery through any duly empowered agent, whether an elective officer of the corporation or a building superintendent, and an individual owner could do likewise through any agent representing him as

building superintendent or general superintendent. But the statute has in terms made the general contractor the owner's agent for the purpose of instancing the delivery of material. By the terms of the statute such contractor is put on a parity with the owner himself. He is as much the owner's agent for the purposes of the act as any other agent and under the general law of agency the act of the agent is the act of the owner. Yet it is conceded that the Supreme Court of Washington has repeatedly held that a delivery to a contractor away from the liened premises is not a furnishing sufficient to give rise to a lien under the statute. Wherein, then lies the distinction?

Under our statute the right to a lien depends not upon the question at whose instance the materials were furnished, for the instancing of the owner and of his contractor are expressly put upon the same basis, but that right depends upon the *furnishing of the material*—that is, according to the Supreme Court's construction, the delivery to the liened premises. A delivery in every case is the primary requisite. It is wholly wanting in both of the cases here involved.

But it is said in the opinion:

> "The Supreme Court of the State has re-
> "peatedly held that delivery at the building
> "is essential where the material is furnished
> "to a contractor. The reason for the rule is
> "that a more liberal construction of the statute

"would permit of the grossest fraud on the "part of contractors and is not necessary for "the protection of bona fide materialmen."

The only case where we can find this reason assigned is in the opinion rendered by Judge Rudkin, when Chief Justice of the Supreme Court of the the State of Washington, in *Gate City Lumber Company vs. Montesano*, 60 Wash. 586. There, however, the action was not for the foreclosure of a materialman's lien but upon a contractor's bond and in the opinion it was expressly noticed that, unlike a lien case, there was no requirement of giving notice of the commencement of furnishing materials:

"The appellant first contends that the "action against it cannot be maintained because "the respondent failed to deliver or mail to "the owner or reputed owner of the property "a duplicate statement of the material furn- "ished, as required by section 1 of the act of "March 4, 1909, Laws of 1909, p. 71 (Rem. & Bal. Code, section 1133.) This section is "a part of the mechanic's lien law of the state, "and has no application to a case of this kind. "The act requiring municipalities to take bonds "from contractors is complete in itself and "contains no provision or requirement such "as the appellant relies on here."

Whatever cogency may inhere in the reasoning of the Court in the instant case—above quoted—

when applied to cases involving bonds given by contractors on public works, ceases to be of effect when applied to a lien case. The basis for such reasoning is wanting in the present case, and as the opinion intimates when the reason fails the rule fails.

The result is inescapable. Of the grounds assigned for differentiating this case from those previously decided by the Supreme Court, the second has been demonstrated to be baseless. The Supreme Court of the State has considered the precise situation described in the opinion as never before considered and has held that the term "furnishing" in the statute requires delivery to the premises even though the materials be specially designed and manufactured. The settled law of the state therefore denies any distinction or difference on this ground.

The first ground assigned has also been shown to be rather a hair splitting distinction without any difference so far as reason and principle applicable thereto are concerned. If such nicety of distinction is to be adopted then we submit that the cases of *Western Hardware & Metal Co. vs. Maryland Casualty Comany*, 105 Wash. 54; and *Holly-Mason Hardware Co. vs. National Surety Co.*, 107 Wash. 74, are not irreconcilable but that there is a cleancut distinction on the facts and according to the statute involved. In the Holly-Mason case supplies or materials were delivered to the *general contractor* away from the seat of the

building operations. In the earlier case supplies or materials were similarly delivered to a *subcontractor, not the general contractor.* The statute involved provides that the bond sued upon shall be conditioned that the contractor shall "pay all persons who shall supply such person or persons or subcontractors with provisions and supplies for the carrying on of such work." (Rem. Code, Sec. 1159). The decision in the Western Hardware case definitely rests upon this express provision of the statute (See 105 Wash. at page 59).

The present case is of equitable cognizance but in conformity to established principles and subject to the construction heretofore placed upon the lien statute by the Supreme Court of the state. The opinion as filed is a general equity review but runs counter to the established construction by the state court. In equity and good conscience an opportunity through a rehearing should be granted for the correction thereof.

As we said at the outset of this petition, so we repeat that we are sincerely appreciative of the early attention which this cause received at the hands of this court. It is eminently desirable that the questions involved in this appeal be finally determined as speedily as possible, to the end that some disposition may be made of the uncompleted building. But, nevertheless, we are so firmly convinced that the points covered by this petition have not been properly resolved that we cannot, in

justice to our clients, refrain from urging them with all earnestness and sincerity upon the attention of this court.

Respectfully submitted,

E. M. HAYDEN
M. A. LANGHORNE and
F. D. METZGER
Solicitors for McClintic-Marshal Company.

The undersigned solicitors for McClintic-Marshall Company do hereby certify that they have read the foregoing Petition for Rehearing and that in their judgment the same is well founded and that it is not interposed for delay.

E. M. HAYDEN
M. A. LANGHORNE
F. D. METZGER